Supreme Court, U.S.
FILED

011306 FEB 26 2002

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No. _____

In The

Supreme Court of the United States

BRIAN DAVID FRYE,

Petitioner,

v.

R. HICKMAN and the Attorney General of the State of California,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner retained counsel to prepare his first federal habeas corpus petition more than three months before the one-year statute of limitations expired. Counsel miscalculated the filing deadline, retained the file for five months, failed to file a petition, and finally returned the file after the statute of limitations had expired. Petitioner then filed this action in pro se.

The question presented is whether the statute of limitations is equitably tolled where Petitioner acted with due diligence but was prevented from filing a timely petition by the dereliction of counsel.

LIST OF PARTIES

The petitioner is Brian David Frye.

The respondents are R. Hickman and the Attorney General of the State of California.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 3

B. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 7

I. EQUITABLE TOLLING OF THE HABEAS CORPUS STATUTE OF LIMITATIONS IS AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE 8

II. THE CIRCUIT COURTS ARE SPLIT ON THE PROPER STANDARD TO ADOPT FOR EQUITABLE TOLLING AND THE LOWER COURTS ARE CONFUSED AS TO WHAT FACTS JUSTIFY ITS APPLICATION 10

A. A circuit split has emerged on the standard for evaluating equitable tolling of the AEDPA statute of limitations 11

B. The confusion in the lower courts on the application of equitable tolling has produced inconsistent and chaotic results 17

CONCLUSION 23

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 21

Baskin v. United States, 998 F. Supp. 188 (D. Conn. 1998) 18

Benitez-Pons v. Puerto Rico, 136 F.3d 54 (1st Cir. 1998) 22

Burton v. Fairman, 2001 WL 925513 (9th Cir. 2001) 11

Calderon v. United States Dist. Ct. (Beeler), 128 F.3d 1283 (9th Cir. 1997) 17

Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530 (9th Cir. 1998) 10

Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995) 20, 21

Chessman v. Teets, 354 U.S. 156 (1956) 8

Davis v. Johnson, 158 F.3d 806 (5th Cir. 1998) 10, 11

Delaney v. Matesanz, 264 F.3d 7 (1st Cir. 2001) 22

Dempsey v. Pacific Bell Co., 789 F.2d 1451 (9th Cir. 1986) 20

Donavan v. Maine, 276 F.3d 87 (1st Cir. 2002) 11, 22

Dring v. McDonnell Douglas Corp., 58 F.3d 1323 (8th Cir. 1995) 15

Duncan v. Walker, 533 U.S. 167 (2001) 9, 10

Dunlap v. United States, 250 F.3d 1001 (6th Cir. 2001) 12, 13, 22

TABLE OF AUTHORITIES – Continued

Page

Easterwood v. Champion, 213 F.3d 1321 (10th Cir. 2000) 19

Erwin v. Elo, 130 F. Supp. 2d 887 (E.D. Mich. 2001) 17

Felder v. Johnson, 204 F.3d 168 (5th Cir. 2000) 19

Gibson v. Klinger, 232 F.3d 799 (10th Cir. 2000) 11

Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) 10, 11, 18, 21

Helton v. Secretary for the Dep't of Corrections, 259 F.3d 1310 (11th Cir. 2001) 11, 18, 19, 20

Irwin v. Dep't of Veterans Affairs, 498 U.S. 1075 (1991) 19

Jihad v. Hvass, 267 F.3d 803 (8th Cir. 2001) 10

Jobe v. Immigration and Naturalization Service, 238 F.3d 96 (1st Cir. 2001) 22

Johnson v. McCaughtry, 265 F.3d 559 (7th Cir. 2001) .. 11, 18

Kreutzer v. Bowersox, 231 F.3d 460 (8th Cir. 2000) 18, 21

Lonchar v. Thomas, 517 U.S. 314 (1996) 9, 10, 12

Marsch v. Soares, 223 F.3d 1217 (10th Cir. 2000) 19

Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) 10, 11

Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616 (3d Cir. 1998) 10

Sandvik v. United States, 177 F.3d 1269 (11th Cir. 1999) 11

Slack v. McDaniel, 529 U.S. 473 (2000) 9

Smith v. McGinnis, 208 F.3d 13 (2d Cir. 2000) 11

TABLE OF AUTHORITIES – Continued

Page

Steed v. Head, 219 F.3d 1298 (11th Cir. 2000)..18, 20, 21

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 9

Seitzinger v. Reading Hosp. & Medical Center, 165 F.3d 236 (3d Cir. 1999)..... 18

Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999)..... 18

United States v. Griffin, 58 F. Supp. 2d 863 (N.D. Ill. 1999)..... 18

United States v. M. J. Kelley Corp., 995 F.2d 656 (6th Cir. 1993) 20, 21

Valverde v. Stinson, 224 F.3d 129 (2d Cir. 2000)..... 20

Vance v. Whirlpool Corp., 707 F.2d 483 (4th Cir. 1983)..... 20

Vasquez v. Greiner, 68 F. Supp. 2d 307 (S.D.N.Y. 1999)..... 18

Whalem/Hunt v. Early, 233 F.3d 1146 (9th Cir. 2000) 19

STATUTES AND RULES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331..... 3

28 U.S.C. § 2244(d) 1, 3, 7, 9

MISCELLANEOUS

W. Duker, A Constitutional History of Habeas Corpus 3 (1980) 8

Mark Hansen, More for Moratorium, ABA Journal 92 (Dec. 2000)..... 15

TABLE OF AUTHORITIES – Continued

Page

R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure (4th ed. 2001) 8

P. Sessions, Swift Justice?: Imposing A Statute of Limitations on the Federal Habeas Corpus Petitioners of State Prisoners, 70 S. Cal. L. Rev. 1513 (1997) 16

The Oxford Dictionary and Thesaurus, American Edition 513 (1996) 15

PETITION FOR A WRIT OF CERTIORARI TO THE UNTED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brian David Frye respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3-5) is reported at 273 F.3d 1144 (9th Cir. 2001). The opinion of the district court (App., *infra*, 6-7) is unreported.

JURISDICTION

The court of appeals entered its amended judgment on December 3, 2001. (App., *infra*, 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) provides in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of

direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioner filed a petition for writ of habeas corpus in pro se on the grounds that he received ineffective assistance of counsel in the criminal proceedings against him. Specifically, Petitioner's trial counsel failed to arrange any psychiatric evaluation of Frye's sanity or capacity,

but falsely represented to the trial court that he had consulted a well-qualified, forensic psychiatrist. The subsequent investigation by Petitioner's state habeas counsel revealed this false representation to the trial court. Moreover, when a qualified expert finally conducted the necessary evaluation, he concluded that Petitioner lacked the capacity to be guilty of the crime for which he had been convicted.

The district court had jurisdiction under 28 U.S.C. § 1331 (general federal question jurisdiction). The district court granted summary judgment and dismissed the petition on finding that it was barred by the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 2244(d), and that the requirements for equitable tolling were not satisfied. (App., *infra*, 6-18.)

The court of appeals appointed pro bono counsel to represent Petitioner. The court of appeals affirmed the district court ruling. In its view, equity did not require the statute of limitations to be tolled despite the dereliction of Petitioner's counsel in miscalculating the statute of limitations, failing to file within the time limit, retaining Petitioner's file for five months while the statute expired, and finally returning the file without ever filing a petition. The court of appeals concluded that dereliction of retained counsel was no basis for equitable tolling. (App., *infra*, 3-5.)

A. Factual Background

Brian David Frye was tried for murder in 1989. His trial counsel was a public defender, Jack Martin, who was

trying his first murder case. He failed to arrange any psychiatric evaluation of Frye's sanity or capacity. Martin falsely represented to the trial court that he had consulted a well-qualified forensic psychiatrist. Frye was convicted and his conviction was affirmed with a modification of sentence. His direct appeal ended in 1992 when the California Supreme Court denied his petition for review.

Frye retained Gail C. Schultze as counsel for post-conviction relief prior to May 22, 1995. Schultze immediately attempted to obtain Frye's file from trial counsel, Jack Martin. Martin responded on June 22, 1995, informing Schultze that the file was lost. Although Martin had represented to the trial court that he had arranged an evaluation of Frye by forensic psychiatrist qualified to serve as a court-appointed expert, he admitted to Schultze that the expert had actually never seen Frye. Schultze then contacted the expert who stated that he had no recollection of Frye's case and that he would not render an opinion on a patient he had not seen. In short, in 1995, Schultze's investigation revealed *for the first time* that Frye's trial counsel had never consulted a psychiatric expert and had falsely represented to the trial court judge that he had done so.

Schultze retained Dr. Ebert to evaluate Frye. Dr. Ebert compiled a written evaluation on May 4, 1996. Based on this report on Frye's lack of capacity, Schultze filed a state petition for writ of habeas corpus in Sacramento County Superior Court on October 4, 1996. (Frye's lack of capacity existed at the time of the underlying incident; he is not claiming lack of capacity at the present time.)

When this petition was denied, Schultze filed a petition in the Court of Appeal and then the California Supreme Court. Schultze terminated her representation of Frye after the California Supreme Court denied his final state petition on May 28, 1997. While the facts are not clear from the record, it appears this termination was abrupt and unanticipated; in Frye's words, "counsel quit."

Frye managed to find new counsel, Kimball F. Sargeant, regarding the possibility of filing a federal habeas petition. On September 29, 1997, Frye delivered to Sargeant all of his records and legal materials. Sargeant's paralegal sent a representation agreement to Frye's mother, Aldene Frye, on September 29, 1997. At that time, Frye had 107 days before the AEDPA statute of limitations was to expire.

Although he knew that the new AEDPA statute of limitations was running, Sargeant did not begin work on the case until December 16, 1997, over two months after he received the file. On December 18, 1997, Aldene Frye wrote expressing concern over the time consumed by Sargeant's evaluation and asking for an update. Sargeant returned a phone call from Aldene Frye on January 9, 1998 to discuss Frye's probability of success.

On February 4, 1998, Sargeant sent Frye a letter summarizing his research, concluding that Frye had a quite low probability of success on a habeas petition. His conclusion was based on an improper interpretation of the phrase "properly filed" in AEDPA. Sargeant had performed only 6.5 hours of document review and apparently no legal research.

The relationship between the parties lasted for over five months, yet Sargeant performed only 11.7 hours of work. On March 2, 1998, Sargeant finally complied with Frye's request to return the file *after he had retained it for 151 days.*

When his file was finally returned, Frye began drafting a petition on his own. However, because he was required to work at his prison job during the week, he only had access to the law library on Saturday since it was not open on Sunday. Even on Saturdays, Frye was sometimes denied access to the law library. The library only admitted ten inmates at a time. It gave priority to inmates who could produce a court order that they had a fixed deadline to meet. Since Frye had no court-ordered deadline, he was not admitted to the library when ten priority inmates were using it. Despite these obstacles, Frye managed to file his federal habeas petition just one month after Sargeant returned the file.

B. Proceedings Below

Petitioner filed his pro se petition for a writ of habeas corpus alleging ineffective assistance of counsel during his criminal trial. He alleged that trial counsel failed to consult with a competent psychiatrist and falsely represented to the trial court that he had done so. When this was discovered during state habeas proceedings, a qualified expert was finally retained, and he concluded that at the time of the criminal incident Petitioner lacked the capacity to have committed the crime for which he had been convicted.

Respondents filed a motion for summary judgment on the grounds that the statute of limitations barred the petition. The district court dismissed the petition as untimely on February 3, 1999, finding that equitable tolling did not apply. (App., *infra*, 6-18.) Petitioner appealed to the Ninth Circuit which then appointed pro bono counsel. On August 6, 2001, the Ninth Circuit affirmed the district court decision. On December 3, 2001, following Petitioner's Petition for Rehearing, the Ninth Circuit amended its August 6, 2001, decision and denied the Petition for Rehearing. (App., *infra*, 1-5.) The court of appeals held that the dereliction of counsel in handling Petitioner's federal habeas petition did not justify equitable tolling of the statute of limitations.

REASONS FOR GRANTING THE PETITION

This case presents a recurring and important question under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Specifically, under what circumstances is equitable tolling available to extend the one-year statute of limitations for habeas corpus petitions filed under 28 U.S.C. § 2244(d). The circuits are split on the standard for equitable tolling, and the lower courts are confused about the facts that may support tolling. This case presents an opportunity for this Court to resolve the inter-circuit conflict and to provide guidance to the lower courts by establishing the appropriate standards for equitable tolling.

I. EQUITABLE TOLLING OF THE HABEAS CORPUS STATUTE OF LIMITATIONS IS AN ISSUE OF EXCEPTIONAL NATIONAL IMPORTANCE.

Since the founding of our nation, "Congress has consistently entitled federal and state prisoners incarcerated in violation of any fundamental legal principle to one meaningful federal court review as of right." 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 2.4e, p. 82 (4th ed. 2001). At times that review has been through a writ of error or appeal; at other times that review has been through a writ of habeas corpus. *Id.* And whenever direct review has been unavailable, "habeas corpus has consistently filled the breach." *Id.* As one scholar observed: "While the meaning of the writs of quo warranto, procedento, mandamus, and certiorari is hidden behind the lawyer's veil of mystery, habeas corpus has long been a part of the vernacular. It is, to lawyer and layman, the great writ of liberty." W. Duker, A Constitutional History of Habeas Corpus 3 (1980).

Reflecting the fundamental importance of "the great writ of liberty," for most of our history, federal habeas corpus petitions were not subject to any fixed time constraints. 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 5.2, p. 230 (4th ed. 2001). As this Court explained: "We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States." *Chessman v. Teets*, 354 U.S. 156, 165 (1956).

In 1996, Congress adopted AEDPA, imposing for the first time in our nation's history a statute of limitations for federal habeas petitions. 28 U.S.C. § 2244(d). Yet in doing so, Congress was careful to provide safeguards to ensure that everyone would have a reasonable time to seek a writ of habeas corpus. *Id.* Consistent with this legislative goal, in interpreting AEDPA restrictions on federal habeas relief, this Court has assumed that Congress did not intend to unfairly deprive state prisoners of first federal habeas corpus review. See *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998) (a petition filed after an initial filing was dismissed as premature should not be deemed a second or successive petition because a dismissal for a technical reason should not "bar the prisoner from ever obtaining federal habeas review"); *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (a petition filed after the dismissal of an initial filing for non-exhaustion should not be deemed a second or successive petition because that would transform a procedural rule into "a trap" for "the unwary *pro se* prisoner" (internal quotations omitted)). See also *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 2132-2135 (2001) (Justice Breyer, *dissenting*) (purpose of § 2244(d) is to grant state prisoners a fair and reasonable time to bring a first federal habeas corpus petition; the Court has assumed that Congress did not want to deprive state prisoners of first federal habeas corpus review). As this Court has explained, "Dismissal of a first habeas petition is a particularly serious matter; for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

Thus, the question presented by this petition is a matter of exceptional national importance because it involves the standards for dismissing a first federal habeas petition not on the merits of the constitutional violation of Petitioner's rights, but on procedural grounds. This dismissal denied Petitioner "the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Id.*

II. THE CIRCUIT COURTS ARE SPLIT ON THE PROPER STANDARD TO ADOPT FOR EQUITABLE TOLLING AND THE LOWER COURTS ARE CONFUSED AS TO WHAT FACTS JUSTIFY ITS APPLICATION.

Every circuit to address the issue of equitable tolling of the AEDPA statute of limitations has held that it is subject to equitable tolling.[1] However, the circuits have adopted different standards for its application, and the lower courts have reached conflicting conclusions about the facts that justify tolling. In addition to the instant case, Petitioner is aware of two other cases where petitions for certiorari have been filed to seek guidance on

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[1] See, e.g., *Jihad v. Hvass*, 267 F.3d 803, 805 (8th Cir. 2001); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000); *Calderon v. United States Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9th Cir. 1998) (*en banc*); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998), *cert. denied*, 526 U.S. 1074 (1999); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.), *cert. denied*, 525 U.S. 891 (1998); see also *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2120, 2130 (2001) (Stevens, J., *concurring*) (noting that equitable considerations may permit courts to fill in Congress' omissions in the statute for unexhausted claims).

the application of equitable tolling under the AEDPA statute of limitations. *Burton v. Fairman*, 2001 WL 925513 (not officially reported) (9th Cir. 2001), petition for certiorari filed December 28, 2001, Docket No. 01-1010, and *Helton v. Secretary for the Dep't of Corrections*, 259 F.3d 1310 (11th Cir. 2001), petition for certiorari filed December 31, 2001, Docket No. 01-7860. This Court should grant review of this case to establish the standard for analyzing equitable tolling and to provide guidance on the factual circumstances that support its application.

A. A circuit split has emerged on the standard for evaluating equitable tolling of the AEDPA statute of limitations.

A circuit split has emerged on the standard for applying equitable tolling. Six circuits require a showing of "extraordinary circumstances."[2] Two others require "rare or exceptional circumstances."[3] In this case, the Ninth Circuit held "there must be 'extraordinary circumstances' beyond a prisoner's control that made it impossible to file a petition on time." (App., *infra*, 4.)

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[2] *Donavan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002) ("extraordinary circumstances"); *Johnson v. McCaughtry*, 265 F.3d 559 (7th Cir. 2001) (same); *Harris v. Hutchinson*, 209 F.3d 325, 329-30 (4th Cir. 2000) (same); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (same); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (same); *Miller v. Marr*, 145 F.3d 616, 618 (3d Cir. 1998) (same).

[3] *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) ("rare and exceptional circumstances"); *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1998) (same), *cert. denied*, 526 U.S. 1074 (1999).

The Sixth Circuit, however, applies a more precise and predictable standard. As will be discussed below, the Sixth Circuit has adopted a five-part test for assessing equitable tolling including specific factors for the courts to evaluate. *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001). Recognizing that other circuits apply a "rare or exceptional" or "extraordinary" circumstances standard, and that its own five-part test is substantially different, the Sixth Circuit observed:

> While we value continuity in standards with our sister circuits, we think it more important to be consistent within our own Circuit as to the standards we are to apply. We therefore hold that hereafter equitable tolling shall only be appropriate, in habeas and all other cases, after a court has properly considered and balanced the factors set out in *Andrews v. Orr* unless there is congressional authority to the contrary.

Dunlap, 250 F.3d at 1009.

This Court should determine which of these standards applies to equitable tolling of the AEDPA statute of limitations. As the following discussion will show, the standard that the Court adopts matters for it determines the outcome in cases where petitioners are denied "the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

Under the Sixth Circuit's approach, Petitioner would most likely be entitled to equitable tolling. The Sixth Circuit's five-factor test considers: (1) the petitioner's lack of notice of the filing requirement; (2) the petitioner's lack of constructive knowledge of the filing

requirement; (3) the petitioner's diligence; (4) the absence of prejudice to the State; and (5) the petitioner's reasonableness in remaining ignorant of the legal requirement for filing his claim. *Dunlap* at 1008.

Turning to the application of this test to the present case, equitable tolling would likely have been granted for the following reasons:

(1) Petitioner lacked notice of the filing requirement. Indeed, he retained a lawyer to determine when the newly adopted AEDPA statute of limitations expired. His lawyer misconstrued the statute and misinformed Petitioner on this point of law.

(2) Petitioner lacked constructive knowledge of the filing requirement. Here, the proper construction of the newly-adopted statute was unresolved. Petitioner depended on counsel to perform the necessary legal analysis and had the right to reasonably rely on his advice.

(3) Petitioner acted diligently. Petitioner retained counsel with more than three months remaining to file the habeas petition. He and his mother diligently prodded the attorney to move expeditiously on the case. Moreover, when his lawyer finally returned the file five months after receiving it, Petitioner managed to draft his own petition and file it within one month despite his difficulty in gaining access to the prison law library.

(4) There is absolutely no prejudice to the State which had been fully informed of Petitioner's arguments and the merits of the habeas petition through the state-court proceedings.

(5) Finally, Petitioner's ignorance of the legal requirements was reasonable. The AEDPA statute was newly enacted. There was – and still is – confusion about its construction. Petitioner retained counsel to answer this difficult legal question, prodded his counsel to respond, and acted promptly on his own behalf as soon as his file was returned to him.

Thus, under the five-factor analysis adopted by the Sixth Circuit, equitable tolling should be applied to extend the statute of limitations and permit the filing of this first federal habeas corpus petition.

On the other hand, the Ninth Circuit concluded that the facts of this case failed to satisfy its "extraordinary circumstances" test. (App., *infra*, 5.) Petitioner submits that this standard is both too vague and too harsh. It is too vague because it lacks any content. It is a conclusion, not an analytical test. One judge may find something extraordinary which the next judge finds commonplace. It comes down to an "I know it when I see it" reaction that invites inconsistent and arbitrary results.

Moreover, as applied in this case, the extraordinary circumstances test short-circuits any meaningful analysis. While many factors support equitable tolling in this case, the court was not obliged to weigh or even acknowledge any fact other than attorney dereliction. Once it found that attorney dereliction was not extraordinary, the outcome was inevitable. This finding eliminated the need to carefully weigh all the factors supporting equitable tolling and substituted a bright-line rule for factual analysis. Unlike the Sixth Circuit standard which guides the analysis through the consideration of multiple factors, the

extraordinary circumstances test allows the court to decide a case without any analysis at all.

The extraordinary circumstances test is also too harsh. "Extraordinary" means "unusual or remarkable; out of the usual course." The Oxford Dictionary and Thesaurus, American Edition 513 (1996). Apparently, the Ninth Circuit does not find counsel's gross dereliction of duty to be unusual. This is a sad commentary on the legal profession. Unfortunately, the court may be correct. For example, the American Bar Association has called for a moratorium on executions in response to evidence of numerous wrongful convictions, widespread racial discrimination, and appallingly inadequate legal representation. Mark Hansen, More for Moratorium, ABA Journal 92 (Dec. 2000). Apparently, in our criminal justice system, injustice is not extraordinary, it has become routine. But that does not make it acceptable.

So in this case, the dereliction of counsel may not be "extraordinary" given the low standards for representation in our criminal justice system. But it is not fair that Petitioner lose all protections of the Great Writ because our standards have fallen so low that dereliction of counsel has become commonplace. The doctrine of equitable tolling exists to achieve fairness. Equitable tolling is applied to provide relief from the harshness of mechanical rules. *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1330 (8th Cir. 1995). For this reason, hard and fast rules do not apply. *Id.* Rather, a "case-by-case analysis, the 'balancing of the equities,' is thus the usual approach when a party seeks to be excused from the indiscriminate sweep of a rigid statute." *Id.* Balancing the equities in this case justifies the application of equitable tolling.

Although dereliction of counsel may have become routine, it is neither fair nor equitable.

Moreover, the bright-light rule that dereliction of counsel cannot justify equitable tolling has serious practical side effects. Most prisoners, of course, proceed in habeas without any legal representation. Statistics show that more than ninety percent of petitioners have no lawyer. P. Sessions, Swift Justice?: Imposing A Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners, 70 S. Cal. L. Rev. 1513, 1558 (1997). Under the rule adopted by the Ninth Circuit in this case, the few petitioners who are represented by counsel rely on them at their peril.

To protect themselves in case their attorneys miss a deadline or are otherwise derelict, represented prisoners will be forced to file premature and duplicative pleadings. In addition to burdening the courts, this will further jeopardize petitioners' rights. For example, if a petitioner filed in pro se to protect himself in case of attorney dereliction and then counsel later filed a timely and meritorious petition, it would be dismissed on the grounds that it was a second or successive petition. Simply put, the Ninth Circuit's rule undermines the attorney-client relationship, multiplies the courts' paperwork, and deprives prisoners of the protection of the writ of habeas corpus.

In short, the circuits are split on the proper standard for applying equitable tolling and the selection of the standard determines the outcome of the cases. Given the importance of the writ of habeas corpus in ensuring

human liberty, this Court should resolve this split and determine the proper standard for equitable tolling.

B. The confusion in the lower courts on the application of equitable tolling has produced inconsistent and chaotic results.

Across this country, a number of factors have frequently been advanced in applying or declining to apply the doctrine of equitable tolling. Given the vagueness of the standard adopted by the majority of the circuit courts, it is not surprising that both the circuit courts and the district courts are confused as to which facts will justify equitable tolling. Indeed, the lower courts' conflicting treatment of factors supporting the application of equitable tolling in this case illustrates the confusion.

In this case, a number of factors support the application of equitable tolling: (1) the attorney's dereliction of responsibility; (2) Petitioner's lack of access to a law library; (3) Petitioner's diligence; (4) the lack of clarity in the law; and (5) the lack of prejudice to the Respondent. But, as this discussion will show, there is no agreement in the lower courts as to whether these factors are relevant to the analysis or, if so, how they should be weighed.

1. *Attorney dereliction and abandonment.* A number of courts have held that an attorney's abandonment of a client or failure to advise the client about a court decision may constitute grounds for equitable tolling. *See, e.g., Calderon v. District Court (Beeler)*, 128 F.3d 1283, 1289 (9th Cir. 1997) (applying equitable tolling where appointed capital habeas counsel resigned); *Erwin v. Elo*, 130 F. Supp. 2d 887, 890 (E.D. Mich. 2001) (applying equitable

tolling where petitioner's counsel never notified him of state court ruling); *Vasquez v. Greiner*, 68 F. Supp. 2d 307 (S.D.N.Y. 1999) (ordering a hearing to determine whether petitioner's counsel failed to notify client of decision); *United States v. Griffin*, 58 F. Supp. 2d 863, 870 (N.D. Ill. 1999) (ordering a hearing to determine if attorney failed to file an appeal after being instructed to do so); *Baskin v. United States*, 998 F. Supp. 188, 189-90 (D. Conn. 1998) (applying equitable tolling where counsel failed to notify petitioner that certiorari had been denied). See also *Seitzinger v. Reading Hosp. & Medical Center*, 165 F.3d 236 (3d Cir. 1999) (non-AEDPA case; attorney misconduct may merit equitable tolling).

On the other hand, in this case the Ninth Circuit found that it was not extraordinary for counsel to miscalculate the statute of limitations, fail to file a timely petition, and fail to return Petitioner's file for five months. See also *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001) (lawyer's mistake is not an extraordinary circumstance justifying the application of equitable tolling); *Helton v. Secretary for the Dep't of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001) (attorney's misinformation as to the filing deadline did not constitute "extraordinary circumstance"); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (attorney's confusion about the AEDPA statute of limitation does not justify equitable tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney's miscalculation of the statute of limitations is not an extraordinary circumstance); *Harris v. Hutchinson*, 209 F.3d 325, 330-331 (4th Cir. 2000) (same); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (same).

2. *Law library access.* Cases considering law library adequacy and access reveal the same confusion. At least two circuits have recognized that inadequacies in a prison law library may be grounds for equitable tolling. *Marsch v. Soares,* 223 F.3d 1217, 1221 (10th Cir. 2000) (closure of law library for fifteen days could be an extraordinary circumstance); *Easterwood v. Champion,* 213 F.3d 1321, 1323 (10th Cir. 2000) (lack of access to an appellate case may support tolling); *Whalem/Hunt v. Early,* 233 F.3d 1146, 1148 (9th Cir. 2000) (*en banc*) (failure to provide copy of AEDPA may support tolling).

On the other hand, at least two other circuits have rejected the argument that lack of access to legal materials justifies equitable tolling. The Fifth Circuit has adopted a bright-line rule that failure of a law library to make the AEDPA available cannot support equitable tolling. *Felder v. Johnson,* 204 F.3d 168, 171-74 (5th Cir. 2000). And the Eleventh Circuit concluded that the prison law library's lack of the AEDPA amendment imposing the one-year statute of limitations was not an "extraordinary circumstance." *Helton v. Secretary for the Dep't of Corrections,* 259 F.3d 1310, 1313-1314 (11th 2001).

In this case, Petitioner was denied access to the law library because he could not produce a court order setting a calendar deadline. Despite the Ninth Circuit's earlier *en banc* conclusion that library access may support tolling, in this case the court failed to address this aspect of Petitioner's argument for equitable tolling.

3. *Petitioner's diligence.* As this Court has explained, diligence should be considered in evaluating equitable tolling. *Irwin v. Dep't of Veterans' Affairs,* 498 U.S. 89, 96

(1991). Some circuit courts have considered diligence in AEDPA equitable tolling cases. *Helton v. Secretary for the Dep't of Corrections*, 259 F.3d 1310, 1313 (11th Cir. 2001); *Valverde v. Stinson*, 224 F.3d 129, 133-34 (2d Cir. 2000); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998). In this case, the court did not consider Petitioner's diligence.

4. *Lack of clarity in the law*. The Ninth Circuit previously held that the lack of clarity in the law could be grounds for equitable tolling. *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862-63 (9th Cir. 1995) (bail bond company's wrongful levy suit entitled to equitable tolling because the decisional law was unclear and the government was not prejudiced); *Dempsey v. Pacific Bell Co.*, 789 F.2d 1451 (9th Cir. 1986) (court of appeals directed district court to consider whether lack of clear precedent in the circuit and absence of prejudice to defendant supported equitable tolling). See also *United States v. M. J. Kelley Corp.*, 995 F.2d 656, 660 (6th Cir. 1993) (statute of limitations under the Miller Act equitably tolled where plaintiff filed in the wrong venue but jurisdiction and venue principles were unclear and only addressed in two published circuit court decisions) and *Vance v. Whirlpool Corp.*, 707 F.2d 483, 489-90 (4th Cir. 1983) (plaintiff allowed to refile complaint because there was no clear precedent on the issue and no prejudice to the defendant). Conversely, the Eleventh Circuit held that lack of precedent on a novel legal question did not justify equitable tolling of the AEDPA statute of limitations. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). This factor is not considered under the extraordinary circumstances standard.

5. *Lack of prejudice to Respondent*. And finally, this Court has held prejudice to the respondent is a factor to

consider in applying equitable tolling. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984) ("absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply.") Indeed, the Ninth Circuit itself previously considered lack of prejudice to be a factor in applying equitable tolling. *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862-63 (9th Cir. 1995) (bail bond company's wrongful levy suit allowed because the decisional law was unclear and there was no prejudice to the government). But this factor is not evaluated under the extraordinary circumstances standard.

Perhaps one of the more troubling aspects of this confusion is that the lower courts seem to be imposing a new, tougher test for equitable tolling in habeas corpus cases compared to other kinds of cases. Some examples illustrate this point. First, earlier decisions considered the confusing state of the law as a basis for equitable tolling. *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862-63 (9th Cir. 1995); *United States v. M. J. Kelley Corp.*, 995 F.2d 656, 660 (6th Cir. 1993). But here and in other AEDPA cases, the general confusion about the statute of limitations cases has usually led the courts to conclude that attorney mistake and miscalculation are not extraordinary. *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (attorney's confusion about the AEDPA statute of limitations does not justify equitable tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (attorney's miscalculation of the statute of limitations is not an extraordinary circumstance); *Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000) (counsel's innocent mistake in misreading a

statute does not constitute an extraordinary circumstance). Similarly, in non-habeas cases, due diligence and lack of prejudice historically have been factors to be evaluated in applying the equitable tolling doctrine. But, as in this case, under the extraordinary circumstances test, these factors fade out of the analysis.

Another example of the harsher approach to equitable tolling for habeas cases is the First Circuit's recent adoption of the extraordinary circumstances test. *Donovan v. Maine*, 276 F.3d 87, 93 (1st Cir. 2002); *Delaney v. Matesanz*, 264 F.3d 7, 14 (1st Cir. 2001). In non-habeas cases involving equitable tolling, the First Circuit had previously adopted the same five-factor as the Sixth Circuit. See *Jobe v. Immigrations and Naturalization Service*, 238 F.3d 96, 100 (1st Cir. 2001) (same five factors for equitable tolling as *Dunlap v. United States*, 250 F.3d 1001, 1008 (6th Cir. 2001); *Benitez-Pons v. Puerto Rico*, 136 F.3d 54 (1st Cir. 1998) (same). Yet, in deciding the standard for equitable tolling under AEDPA, the court – without explanation – switched to the extraordinary circumstances test. As it stated, "In the AEDPA environment, courts have indicated that equitable tolling, if available at all, is the exception rather than the rule; resort to its prophylaxis is deemed justified only in extraordinary circumstances." *Delaney*, 264 F.3d at 14.

In short, because the extraordinary circumstances test provides no standards for evaluating equitable tolling, the courts are reaching arbitrary and inconsistent results. In addition, under the extraordinary circumstances test, the lower courts appear to be imposing harsher standards for equitable tolling in habeas cases compared to those imposed in other civil actions. Given the importance of

the Great Writ in safeguarding liberty, it should not be subjected to a stricter standard than other cases. As in other cases, equitable tolling of the AEDPA statute of limitations should be applied to achieve fairness and equity. This Court should bring clarity and uniformity to the doctrine of equitable tolling.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2002

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN DAVID FRYE, *Petitioner-Appellant,* v. R. HICKMAN, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellees.*	No. 99-15935 D.C. No. CV-98-00632-LKK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding
San Francisco, California

Argued and Submitted
June 12, 2001 – San Francisco, California

Filed August 6, 2001
Amended December 3, 2001

Before: Mary M. Schroeder, Chief Judge, Donald P. Lay.*
David R. Thompson, Circuit Judges.

Opinion by Chief Judge Schroeder

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* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit sitting by designation.

ORDER

The Opinion filed August 6, 2001, is amended as follows:

(1) Delete entire paragraph following headnote [3], Slip Opinion, page 10167;

(2) In its place, substitute the following paragraph:

We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2000) (AEDPA statute of limitations not equitably tolled by lawyer's mistake resulting in missed deadline, because such a mistake is not an extraordinary circumstance); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (concluding that, to the extent any equitable tolling is available for AEDPA, no tolling occurred because of a lawyer's mistake resulting in a missed deadline).

The panel has voted to deny the Petition for Rehearing and to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R.App. P. 35(b).

With the above amendment the Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

OPINION

SCHROEDER, Chief Judge:

California state prisoner, Brian David Frye, filed a 28 U.S.C. § 2254 petition after the expiration of the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1). The key issue in this appeal is whether the statute of limitations was equitably tolled when his attorney negligently failed to file a petition within the year, even as adjusted to account for statutory tolling. The district court held that there was no equitable tolling. We appointed counsel because the issue is one of first impression in this circuit. We have been greatly assisted by appointed counsel's participation through our Pro Bono Representation Project.

Petitioner was tried on charges of first degree murder and attempted murder on May 2, 1989. On August of that year, the jury found him guilty of those offenses. On October 20, 1989, the California Court of Appeal affirmed petitioner's conviction and partially modified his sentence. The California Supreme Court denied his petition for review in September 1992. Petitioner then pursued state habeas relief, beginning with a filing in Sacramento County Superior Court on October 4, 1996. The Superior Court denied the petition on December 4, 1996. On February 3, 1997, petitioner filed an appeal. The California Court of Appeal denied the petition on February 21, and the California Supreme Court eventually denied the petition on May 28, 1997. Petitioner filed his federal habeas petition in April 1998, over five years after the California Supreme Court denied his direct appeal. His appointed

counsel on appeal have shown that the AEDPA statute should be statutorily tolled for varying reasons, principally because of the pendency of state habeas proceedings. *See Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). The statutory tolling brings the limitation period to approximately 78 days before the petition was actually filed, a conclusion the state commendably does not seriously dispute. The case therefore turns on equitable tolling.

For a petitioner to have the benefit of equitable tolling of the AEDPA statute, we have held that there must be "extraordinary circumstances" beyond the prisoner's control that made it impossible to file a petition on time. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997). In our more recent en banc pronouncement on the subject, we rejected the argument that lack of access to library materials automatically qualified as grounds for equitable tolling, and we emphasized the importance of a more fact-specific inquiry. *Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc).

In *Beeler*, a capital habeas corpus case, we held that the statute was equitably tolled when the petitioner's attorney moved out of the state, a matter over which the petitioner had no control, and that made it impossible for another attorney to file a petition within the statutory limits. In capital cases, an indigent petitioner has a statutory right to counsel. *See* 21 U.S.C. § 848(q)(4)(B). Thus, the dereliction of his appointed counsel made it impossible for the petitioner to file the petition he was statutorily entitled to file. *Beeler*, 128 F.3d at 1288.

We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling. *See Harris v. Hutchinson*, 209 F.3d 325, 330-31 (4th Cir. 2001) (AEDPA statute of limitations not equitably tolled by lawyer's mistake resulting in missed deadline, because such a mistake is not an extraordinary circumstance); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (concluding that, to the extent any equitable tolling is available for AEDPA, no tolling occurred because of a lawyer's mistake resulting in a missed deadline).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIAN DAVID FRYE,
Petitioner,
vs
R. HICKMAN, et al.
Respondents.
_____/

No. CIV S-98-0632 LKK GGH P

ORDER

(Filed Feb. 3, 1999)

Petitioner, a state prisoner, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On December 7, 1998, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed December 7, 1998, are adopted in full; and

2. Respondent's May 15, 1998 motion to dismiss is granted and this action is dismissed.

DATED: February 2, 1999.

/s/ Lawrence K. Karlton
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

BRIAN DAVID FRYE

v. CASE NUMBER: CIV S-98-0632 LKK GGH P

R. HICKMAN, et al.

(Filed Feb. 3, 1999)

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF FEBRUARY 3, 1999.

ENTERED: February 3, 1999

Jack L. Wagner,
Clerk of the Court
by: /s/ A. Souvannarath
A. Souvannarath,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIAN DAVID FRYE,
Petitioner,
vs.
R. HICKMAN, et al.,
Respondents.
_____/

No. CIV S-98-0632 LKK GGH P

FINDINGS AND RECOMMENDATIONS

(Filed Dec. 7, 1998)

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 1989 conviction for first degree murder and attempted murder. Pending before the court is respondent's motion to dismiss. Respondent argues that the instant petition, filed April 8, 1998, is barred by the statute of limitations.[1]

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted. AEDPA amended 28 U.S.C. § 2244(d)(1) so that it now provides,

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

[1] Respondent also seeks dismissal on grounds of procedural default. Because the court ultimately recommends dismissal on statute of limitations grounds, the court does not reach the procedural default issue.

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Section 2244(d)(2) provides that the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Petitioner was convicted on August 23, 1989. On September 16, 1992, the California Supreme Court denied petitioner's petition for review. (See Respondent's Exhibit 1.) Therefore, his judgment became final prior to enactment of AEDPA. The Ninth Circuit has held that AEDPA's one year statute of limitations for habeas corpus petitions filed pursuant to 28 U.S.C. § 2254 does not run against any state prisoner prior to the date of the statute's enactment. *Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1286 (9th Cir. 1997). Therefore, petitioner had

until April 23, 1997 – one year from the date of the statute's enactment – to timely file a § 2254 petition. The instant petition, filed April 8, 1998, was not timely filed.

During the time the statute of limitations would be running, however, petitioner had several state habeas corpus petitions pending. Section 2244(d)(2) provides that the time during which these petitions were pending cannot be counted toward the one year period. Petitioner filed a habeas corpus petition in the Sacramento County Superior Court on October 4, 1996. The Superior Court denied the petition on December 4, 1996. (See Respondent's Exhibits 2 and 3.) On February 3, 1997, petitioner filed a petition for writ of habeas corpus in the California Court of Appeal. (See Respondent's Exhibit 4.) On February 13, 1997, the Court of Appeal denied the petition. (See Respondent's Exhibit 5.) On February 21, 1997, petitioner filed a petition for writ of habeas corpus in the California Supreme Court. (See Respondent's Exhibit 6.) On May 28, 1997, the California Supreme Court denied the petition. (See Respondent's Exhibit 7.)

Petitioner's state habeas petitions were pending for a total of 171 days (62 days in Superior Court, 11 days in the Court of Appeal, and 98 days in the California Supreme Court). Adding 171 days to April 23, 1997, brings petitioner's filing date to October 11, 1997. As stated above, the instant petition was filed on April 8, 1998.

In *Beeler, supra,* the Ninth Circuit also found that the statute of limitations could be equitably tolled if extraordinary circumstances beyond a prisoner's control made it impossible to file the petition on time. *Beeler,* 128 F.3d at

1288. In his opposition to the motion to dismiss, petitioner stated that on September 29, 1997, he was "able to obtain legal assistance to review petitioner's claims by Attorney Kimball J.P. Sargeant in Davis, CA. However, Mr. Sargeant did not complete his review until February 4, 1998." On February 4, 1998, Mr. Sargeant informed petitioner that he would have to file the petition on his own because petitioner could not afford his services.

On September 10, 1998, the court issued an order stating that petitioner was apparently claiming that had attorney Sargeant performed a timely review of his case, his petition could have been timely filed. The court ordered petitioner to file copies of his correspondences with Mr. Sargeant. On September 22, 1998, petitioner filed copies of the relevant correspondences. On October 15, 1998, respondent filed a supplemental points and authorities addressing this additional briefing.

Attached as exhibit 1 to petitioner's September 22, 1998, briefing is a copy of a letter dated September 29, 1997, to petitioner's mother from Judith Carlson, paralegal to Mr. Sargeant. This letter states that the contract for Mr. Sargeant's services is enclosed. A copy of the contract is attached to exhibit 1. According to the contract Mr. Sargeant was hired to perform an "in-depth consultation relating to a possible federal habeas corpus petition." Attached as exhibit 2 is a letter dated December 18, 1997, from petitioner's mother and Don Nardinelli to Mr. Sargeant. This letter expresses concern that Mr. Sargeant has not completed his review of petitioner's case:

> This letter is being written in regards to the time-frame involved in "in-depth" consultation for Brian Frye. Brian's mother and myself are

> concerned with this window of time. We feel the more time that is passing, the less avenues we have for appeals. Since attorney has agreed to keep client informed as to significant developments on this consultation, we are interested in knowing if any developments have occurred since the original contract date of October 1, 1997?

Attached as exhibit 3 to petitioner's September 22, 1998, briefing is a letter from Mr. Sargeant to petitioner (February 4, 1998). In this letter, Mr. Sargeant concluded that "there is a quite low probability of [petitioner] achieving success on a federal habeas petition." Mr. Sargeant went on to discuss the reasons for this conclusion. He also informed petitioner of the statute of limitations discussed above. He stated that petitioner had until April 23, 1997, to file his petition. He also opined that the federal court would not consider tolling the time his state habeas petition was pending in superior court insofar as the filing period was concerned because it was not "properly filed." According to Mr. Sargeant, it was not properly filed because the Superior Court denied it as untimely.

Attached as exhibit 4 to petitioner's September 22, 1998, briefing is a letter from Judith Carlson to petitioner dated March 2, 1998. The letter states, "As you requested, enclosed please find the documents provided to our office for use in your consultation." Finally, attached as exhibit 5 is a billing statement from Mr. Sargeant to petitioner's mother dated March 6, 1998.

As calculated by the court above, petitioner's habeas petition was actually due to be filed in federal court no later than October 11, 1997. He filed it on April 8, 1998,

apparently after receiving the documents from Mr. Sargeant referred to in the March 2, 1998, letter. The issue for this court to decide is whether petitioner's hiring of Mr. Sargeant approximately ten days before his habeas petition was due justifies equitable tolling. For the reasons discussed below, this court finds that it does not.

As stated above, equitable tolling will not be available in most cases because tolling should only be granted if extraordinary circumstances beyond a prisoner's control make it impossible for him to file a petition on time. *Beeler*, 128 F.3d at 1288-89. As held in *Beeler*, "[w]e have no doubt that district judges will take seriously Congress's desire to accelerate the federal habeas process, and will only authorize extensions when this high hurdle is surmounted." 128 F.3d at 1289. "Mere excusable neglect" is insufficient as an extraordinary circumstance. *Miller v. New Jersey Dept. of Corrections*, 145 F.3d 616, 619 (3rd Cir. 1998). Moreover, ignorance of the law does not constitute such extraordinary circumstances. *See Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 909 (9th Cir. 1986).

In *U.S. v. Van Poyck*, 980 F. Supp. 1108, 1110-11 (C.D. Cal. 1997), the court found that a petitioner's circumstances were not extraordinary despite the fact that they were seemingly beyond his control; inability to obtain transcripts from court reporters, and general prison lockdowns preventing the prisoner's access to the library and a typewriter which were necessary to his motion. Further, the Ninth Circuit has held that even a situation as extreme as a petitioner's mental incompetency did not constitute extraordinary circumstances because he had been represented by counsel for a long time and had a

friend appointed on his behalf. *Calderon v. U.S. Dist. Ct. For Cent. Dist. Of Ca. (Kelly)*, 127 F.3d 782 (9th Cir. 1997). Extraordinary circumstances are not easily found.

This court is cognizant that the total period of Mr. Sargeant's consultation exacerbated the delay in petitioner's filing of the instant petition. It is unfortunate that Mr. Sargeant did not realize the habeas corpus petition was due on October 11, 1997, and advise petitioner of this.[2] Nevertheless, petitioner sought a consultation from

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[2] Mr. Sargeant was under the impression that petitioner had come to him too late because petitioner would receive no tolling for his Superior Court petition on account of it not being properly filed – the Superior Court had found petitioner's claims untimely. While Mr. Sargeant was correct in his belief that improperly filed state court petitions do not toll the AEDPA limitations statute, the "properly filed" aspect of § 2244(d)(2) only implicates the procedures directly related to the filing of the petition; it does not contemplate procedural or substantive rulings on the merits of the petition.

The Third Circuit and numerous district courts have rejected the argument that a state petition rejected on procedural grounds is not a "properly filed application" within the meaning of § 2244(d). *Lovasz v. Vaughn*, 143 F.3d 146, 148-49 (3d Cir. 1998) (holding that even a meritless application for state post-conviction relief, such as a successive petition, may be considered a "properly filed application" for purposes of the AEDPA one-year limitations period where the petition was submitted in accordance with the state's procedural requirements, such as the rules governing the time and place of filing); *Souch v. Harkins*, ___ F. Supp. 2d ___, No. Civ-97-1663 PHX ROS, 1998 WL 661389, at *5 (D. Ariz. Sept. 22, 1998) (holding that a state petition filed in compliance with all filing requirements, which included the requirement of a form petition plus points and authorities, was "properly filed"); *Joyner v. Vacco*, No. 97-CIV.7047 (DLC), 1998 WL 633664, at *3 (S.D.N.Y. Sept. 15, 1998) ("This Court concludes that to be

Mr. Sargeant only ten perhaps eleven days before the petition was due. These circumstances did not prevent petitioner from timely filing his petition given the entire period at issue.

In any event, the overall equities of the situation do not favor petitioner. Whether or not petitioner's first round of state petitions were properly procedurally barred as a matter of law, the fact remains that petitioner does not satisfactorily explain why he did not raise his claims in a reasonable time after his conviction became final – September, 1992. The state habeas corpus petitioners were not commenced until October 4, 1996. The lengthy four year period of delay when petitioner was not pressing any habeas claims negates any assertion that petitioner's untimely filing herein should be wholly or

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'properly filed' under AEDPA the state application for collateral review must be no more than comply with procedural filing requirements, such as requirements that it be timely filed, be submitted in the proper forum, and include notice to the respondents."); *Ellis v. Johnson*, 11 F. Supp. 2d 695, 698 (N.D. Tex.1998) (holding that a second state petition dismissed for abuse of the writ was "properly filed," and acknowledging Third Circuit definition of "properly filed" to mean compliance with state's procedural requirements such as rules governing time and place of filing); *Galindo v. Johnson*, ___ F. Supp. 2d ___, No. P-97-CA-074, 1998 WL 554228, at *3 (W.D. Tex. June 15, 1998) (recognizing most common interpretation of "properly filed" as requiring filing "pursuant to the proper statute and otherwise in satisfaction of procedural requirements, such as timeliness and proper place of filing"); *Holloway v. Corcoran*, 980 F. Supp. 160, 161 n.5 (D. Md. 1997) (same); *Hughes v. Irvin*, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (requiring only compliance with procedural requirements such as correct place, notice to respondent and timeliness).

primarily attributed to Mr. Sargeant's incorrect legal judgment concerning the tolling effect of the Superior Court petition made by Sargeant during the last ten days of the limitations period (assuming that Mr. Sargeant even looked at the file during that short period of time after he was initially retained). Moreover, while petitioner is undoubtedly correct that his *pro se* status, along with attendant lack of legal resources, greatly complicated his legal situation, the same can be said of 90% of state prisoners who file habeas corpus petitions. Excusing compliance with the statute of limitations because of the lack of legal representation would have the exception of equitable tolling swallow the rule of the limitations statute. *Beeler* had something else in mind other than *pro se* status when it defined extraordinary circumstances.

In light of the above recommendation the court need not make findings on respondent's procedural default motion. Accordingly, IT IS HEREBY RECOMMENDED that respondent's May 15, 1998, motion to dismiss be granted and this action be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time

may waive the right appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 3, 1998.

/s/ Gregory G. Hollows
GREGORY G. HOLLOWS
UNITED STATES
MAGISTRATE JUDGE